BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GERALD D. WOEHR Claimant	)	
V.	)	
EMERSON CONSTRUCTION, INC. Respondent	)	Docket No. 1,074,910
AND	)	
KANSAS BUILDERS INSURANCE GROUP Insurance Carrier	)	

ORDER

Claimant requested review of the January 13, 2016, preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders. Jeff K. Cooper appeared for claimant. Roy T. Artman appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the judge and consists of the January 13, 2016 preliminary hearing transcript and exhibits thereto, together with the pleadings contained in the administrative file.

ISSUES

Claimant alleged sustaining repetitive trauma in the fall of 2014. The judge found claimant failed to prove respondent had appropriate notice of his "accident"[1] within 20 days. Claimant argues he provided notice and respondent had actual knowledge of his injuries by repetitive trauma.

Respondent contends the judge's Order should be affirmed. Respondent argues claimant did not prove timely notice of his alleged accidental injury by repetitive trauma.

The issue is: did respondent have notice and/or actual knowledge of claimant's alleged injury by repetitive trauma?

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[1] References in the administrative file to an "accident" should refer to "repetitive trauma." The May 15, 2011 amendments to the Kansas Workers Compensation Act differentiate injury by accident and injury by repetitive trauma.

FINDINGS OF FACT

Beginning in 2001, claimant worked for respondent operating heavy equipment. On or about November 1, 2014, claimant was operating a dirt-hauling loader with rubber tires on a haul road located on the backside of a dam at Lake Vaquero. Claimant testified the haul road had several holes and soft spots, and he felt a "constant pounding"[2] while driving over the road, which he stated caused his neck injury.

At claimant's request, Gerald Phillips, an coworker who maintained the haul road, attempted to repair the road, but it deteriorated and eventually developed holes so large the loader's undercarriage would drag on the ground. Claimant said he worked with the haul road in this condition for about two to three weeks.

Claimant testified he informed a coworker, Bill Scott, about his neck problems. Claimant stated Mr. Scott was not a foreman, but he, at times, coordinated the work to be done on-site. Claimant also testified Mr. Scott acted like a supervisor and claimant somewhat considered him a supervisor. Claimant's final testimony on Mr. Scott's supervisory status was mixed, indicating he was not a foreman, but he would sometimes tell claimant what to do.

Stanley Emerson is the president of respondent and was boss, job foreman and superintendent for the Lake Vaquero job. Mr. Emerson testified Mr. Scott is an employee, not a superintendent or foreman.

Claimant called Mr. Emerson and informed him he was taking off work due to neck pain. According to claimant, he also had phone calls with Mr. Scott, and Mr. Scott told him the night after he stopped working that respondent's owner, Harley Emerson, would likely "pay for that if you want to go to the doctor[,]" to which claimant responded, "[W]ell he should. It happened here."[3]

Claimant remained off work for a few days before calling Mr. Emerson and requesting to return to work. Claimant described the conversation:

Q Do you know if he knew why your neck was hurting?

A He had to.

Q Why is that?

A He knows dirt, dirt work.

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[2] P.H. Trans. at 9.

[3] *Id.* at 14.

Q You believe he knew that you were bouncing up and down on this road?

A Sure he did.

Q Was he present when the road was like that?

A Yes. But he was also working too basically.[4]

. . .

Q You testified already, but, do you believe that your employer was well aware of what was causing the problem?

A Yes.[5]

. . .

Q Just so I understand. You talked to him right before you went back to work, over the phone?

A Right.

Q About coming back to work?

A Yes.

Q Did you talk to him then about being hurt at work?

A Well, yeah. I told him my back -- neck was messed up, or whatever, from my work.

Q Did you tell him how you hurt your neck at work?

A No. I didn't figure I had to tell him. He knew.

Q Did you ask him for any medical treatment at that time?

A No, I did not.[6]

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[4] *Id*. at 12.

[5] *Id*. at 17.

[6] *Id*. at 22.

Claimant worked one day and part of the following day before permanently leaving work. Claimant's last day worked was November 5 or 6, 2014, and he did not work subsequently.

Mr. Emerson agreed that he and claimant had a phone call just before claimant returned to work. He further testified about the phone conversation:

> Q Did [claimant] indicate why he was off work?
>
> A Because his neck was hurting.
>
> Q Did he indicate that he had an on-the-job injury?
>
> A I don't specifically remember the conversation. But I think that there was probably some reference to it. And I know that he had talked to [Mr. Scott] sometime prior to that and [Mr. Scott] had related to me.
>
> Q Bill Scott had talked to you about him not being at work?
>
> A Yes.
>
> Q And again, I'm not requesting word-for-word, but do you recall what he advised you?
>
> A [Mr. Scott] had just told me that [claimant's] neck was hurting from working out there.[7]

Mr. Emerson agreed he could see the state of the haul road while on-site and agreed the loader claimant operated bounced up and down in the holes and ruts. He continued:

> Q And I take it from your testimony that you were aware [claimant] was having problems with his neck, correct?
>
> A Yes, at some point in time.
>
> Q And he didn't report to you a specific injury. But you were aware that he was complaining of the problems with his neck because of bouncing around on the rough fill road, correct?
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> A Correct.[8]

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[7] *Id.* at 32-33.

[8] *Id.* at 36.

Claimant sought medical treatment in July 2015. Claimant stated the pain would come and go, and he initially thought his condition would resolve on its own. Claimant indicated he suffers from headaches, pain down his neck, and pain down both shoulders into both elbows. He denied problems with his neck prior to November 2014.

The preliminary hearing Order states:

> The only provision in the notice statute, where it can be found Claimant gave proper notice is the provision where the notice provisions in subsection (a) shall be waived if the employer had actual knowledge of the injury.
>
> After reviewing the evidence it is found that the employer knew Claimant's neck was bothering him, the haul road was rough and that Claimant's neck was hurt from working there. Such knowledge is insufficient to constitute notice. The employer didn't know what about work injured Claimant's neck, when Claimant injured his neck and that Claimant wanted to file a worker's compensation claim.[9]

Claimant appealed.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-501b(c) states claimant carries the burden of proving his right to an award of compensation based on the whole record. The burden of proof is based on a "preponderance of the credible evidence" and a "more probably true than not true" standard, as noted in K.S.A. 2014 Supp. 44-508(h).

K.S.A. 2014 Supp. 44-508 states in part:

> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
>
> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
>
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

[9] ALJ's Order at 5.

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2014 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(c) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

. . .

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; . . . .

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

Historically, the purpose of notice is to afford the employer an opportunity to investigate the claim, provide early diagnosis and treatment, and prepare a defense.[10] Our Supreme Court interpreted the notice requirement, as articulated in a prior version of K.S.A. 44-520 containing similar language, as follows:

> The statute does not require that the notice be given by the workman personally, and it is sufficient if the giving of the notice is naturally prompted by consideration of the injury and the relationship between the workman and his employer. A reference to the injury in casual conversation would not be notice, but the notice need not be in writing, and need not have the definiteness and certainty of detail of a common-law indictment for crime . . . . Whether an injury may prove to be compensable may not be presently known, and what the statute contemplates is notice of injury, so that the employer may have fair opportunity to investigate the cause and observe the consequences.[11]

ANALYSIS

Determining if timely notice was satisfied necessarily requires determination of the date of injury by repetitive trauma, which in this case was claimant's last day worked.

Claimant testified respondent was aware his neck was hurt due to him repeatedly driving over a rough road. Claimant perhaps assumed respondent knew why he was hurt, but his assumption was accurate. Mr. Emerson's testimony convinces this Board Member that respondent had notice of claimant's injury by repetitive trauma, such that K.S.A. 2014 Supp. 44-520 was satisfied. Mr. Emerson's testimony dovetails nicely with claimant's testimony:

- Mr. Emerson agreed he and claimant probably referenced a work-related injury in their phone call just days before claimant's last day worked.
- Mr. Emerson also testified Mr. Scott told him that claimant's "neck was hurting from working out there."
- Mr. Emerson testified he knew the fill road was in rough shape.
- Mr. Emerson knew claimant associated his neck pain with bouncing around on the rough fill road.

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[10] *Pike v. Gas Service Co.*, 223 Kan. 408, 409-10, 573 P.2d 1055 (1978).

[11] *Davis v. Skelly Oil Co.*, 135 Kan. 249, 251, 10 P.2d 25 (1932). *Davis* was favorably cited in recent appellate opinions. See *Battah v. Hi-Lo Indus., Inc.*, No. 110,972, 2014 WL 7152361 (Kansas Court of Appeals unpublished opinion filed Dec. 12, 2014) and *Brackett v. Dynamic Educ. Sys.*, No. 108,134, 2013 WL 1339916 (Kansas Court of Appeals unpublished opinion filed Mar. 29, 2013).

Respondent had notice claimant was alleging a work injury while working on the Lake Vaquero job, in particular from driving over a rough fill road. Respondent had such notice before claimant's last day worked. Notice may be provided prior to claimant's legal date of injury by repetitive trauma.[12]

This Board Member need not address actual knowledge or whether Mr. Scott was a supervisor.

CONCLUSIONS

Respondent had notice of claimant's injury by repetitive trauma.

WHEREFORE, this Board Member reverses and remands the preliminary hearing Order dated January 13, 2016 for consideration of claimant's requests.[13]

IT IS SO ORDERED.

Dated this _____ day of March, 2016.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: Jeff K. Cooper
jeff@jkcooperlaw.com; toni@jkcooperlaw.com

Roy T. Artman
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Hon. Rebecca Sanders, Administrative Law Judge

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[12] *Gilkey v. State of Kansas*, No. 1,066,859, 2016 WL 453036 (Kan. WCAB Jan. 26, 2016); *Whisenand v. Standard Motor Products*, No. 1,056,966, 2012 WL 369779 (Kan. WCAB Jan. 23, 2012); see also the application of the predecessor statute in *Hunt v. Integrated Solutions, Inc.*, No. 1,046,939, 2010 WL 1918584 (Kan. WCAB Apr. 14, 2010) ("Admittedly, it seems unusual to conclude an injured employee gave notice of an accident that had yet to occur. Yet, that is a function of the legal fiction that results in cases of microtraumas and the terms of K.S.A. 44-508(d).").

[13] By statute, the above preliminary hearing findings and conclusions are neither final nor binding because they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.